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Supreme Court of the United States

No.

KENNETH W. PINKSTAFF

THE PENNSYLVANIA RAILROAD COMPANY
a corporation

P[illegible] For Writ Of Certiorari To
The Supreme Court Of Illinois

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1960.

No.

KENNETH W. PINKSTAFF,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a corporation,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

THE OPINIONS BELOW.

The Opinion of the Supreme Court of Illinois is reported as *Pinkstaff* v. *The Pennsylvania Railroad Company*, 20 Ill. 2d 179 (Advance Sheet, Volume 20, No. 3), 170 N.E. 2d 139. (Advance Sheet, Volume 170, Volume .....). That Opinion is reprinted in full as Appendix I to this Petition, *post* pp. 1a to 11a.

The Opinion of the Appellate Court for the First District of Illinois is reported as *Pinkstaff* v. *The Pennsylvania Railroad Company*, 23 Ill. App. 2d 507. That Opinion is reprinted as Appendix II to this Petition, *post* pp. 13a to 35a.

The circuit Court of Cook County, Illinois, wrote no opinion.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Date of Judgment Sought to Be Reviewed.

The judgment sought to be reviewed was rendered by the Supreme Court of Illinois on September 9, 1960.

The Supreme Court of Illinois denied petitioner's petition for rehearing on November 30, 1960, the date of final judgment. The order of denial of rehearing appears as Appendix IV.

THE QUESTION PRESENTED.

In an action under the Federal Employers' Liability Act, is it proper for the defendant to plead and the Court to instruct the jury that evidence of the violation of the Safety Appliance Act by the railroad may be considered as evidence of negligence on the part of the employee?

THE STATUTORY PROVISIONS CONFERRING JURISDICTION ON THIS COURT TO REVIEW THE JUDGMENT IN QUESTION BY WRIT OF CERTIORARI.

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code, providing for review by this Court by *certiorari* of decisions of State courts wherein a right is specially claimed under the statutes of the United States. The Federal rights claimed in this case and involved in the questions presented arise under the Federal Safety Appliance Act, 45 U.S.C., Section 11, and the Federal Employers' Liability Act, 15 U.S.C.A., Sections 51, 55.

THE FEDERAL STATUTES INVOLVED.

The statutes involved are the Federal Safety Appliance Act, U.S.C., Title 45, § 1, and the Federal Employers' Liability Act, U.S.C., Title 45, §§ 51, 53.

Those sections are as follows:

45 U.S.C.A., Sec. 1:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, Sec. 1, 27 Stat. 531."

45 U.S.C.A., Sec. 51:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due

to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. April 22, 1908, c. 149, §§ 1, 35 Stat. 65; August 11, 1939, c. 685, §§ 1, 53 Stat. 1404."

45 U.S.C.A., Sec. 53:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence, in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Section 3, 35 Stat. 66."

STATEMENT OF THE CASE.

This statement omits all reference to matters relied upon in the State court's that are not material to the Federal questions heretofore stated.

All quotations in this narration of the facts are from the language of the Opinion of the Supreme Court of Illinois.

On March 29, 1955, a train operated by respondent in interstate commerce at Linton, Indiana (App. I, p. 1a) "did not stop, but continued southward to strike a brick embankment, crushing the plaintiff," who was employed by the respondent as a rear brakeman, "between the car and the embankment." (App. I, p. 3a)

The plaintiff brought this suit under the Federal Safety Appliance Act and the Federal Employers Liability Act to recover for very serious injuries.

On March 29, 1955, the Respondent's switching crew was bringing hopper cars into a mine near Linton, Indiana. The track runs north and south. At the south end is a clay embankment about four feet high.

At the rear of the cut of cars was a locomotive which was pushing them. Petitioner was on top of the leading car, the one most distant from the locomotive, so that he could relay signals to the crew to control the movement of the train.

On that day there was a replacement member of the crew, and he was not in the proper place to receive signals.

When the lead car was about ten car lengths away from the end of the track, Petitioner gave a "steady" signal.

There was no response. When it was about eight car lengths away from the end of the track, he gave a "stop" signal. The train, however, continued.

Petitioner opened the angle cock to stop the train. At that time, the lead car was about three car lengths from the end of the track. In his opinion, as an experienced railroad man, this train with 26 hopper cars moving at five to six miles per hour, should stop within 50 to 60 feet after the angle cock had been opened, if the brakes were operating efficiently.

The train did not stop, but continued to the end of the track and struck the clay embankment, crushing Petitioner between the end of the car and the embankment. (App. I, pp. 1a-3a.)

Petitioner's testimony that in petitioner's "opinion as an experienced railroad man, 26 hopper cars in the cut moving about five miles an hour, the train should stop within 50 or 60 feet when the angle cock is opened on the end car, so that there was ample time for the train to stop before reaching the embankment," stood uncontradicted.

This case differs signally from many cases involving the alleged failure of air brakes to operate efficiently in that here there was *no testimony whatever* that there was any evidence of the efficiency of the brakes counter to petitioner's evidence.

The trial court gave the following instruction, referred to throughout the record and in the opinions of the State Courts as Instruction No. 11:

> "The defendant in this case filed an answer to both counts of the plaintiff's complaint. *The defendant denies that it or any of its agents or employees were guilty of any acts of negligence.* In answer to Count

I the defendant admits that plaintiff was injured but denies the extent of the injuries claimed.

"Furthermore, *the defendant states that the plaintiff was not in the exercise of due care and caution for his own safety at the time of, and immediately prior to the occurrence, and the defendant further states that the plaintiff* was careless and negligent in the following respects:

"Failed to keep a lookout in the direction in which the train was proceeding;

"Failed to use a tail hose as provided and required by the rules in the Bicknell District;

"Failed to operate the air brake in time to stop the train before it collided with a dirt embankment;

"As to Count II the defendant further denied that it violated the Federal Safety Appliance Act and denies that the air brakes in question failed to operate efficiently."

Parenthetically, it should be observed that at the time the cause was submitted to the jury, the so-called answer had not been filed. (R. 22-23)

Petitioner has aptly preserved in the State Courts his contention that this instruction promiscuously and therefore impermissibly commingled the following propositions, each of which was indeed asserted in respondent's answer, but each which, if true, would have very different effects upon the measure of petitioner's damages or upon his right to recover damages at all.

The instruction told the jury that it could consider as evidence of the employee's negligence the fact that he "failed to operate the air brake in time to stop the train before it collided with a dirt embankment." Since the evidence showed that Petitioner had applied the brakes in time to stop the train, had the brakes been efficient, the effect of such an instruction was to allow the railroad to

assert as negligence on the part of the employee its own violation of the Safety Appliance Act.

The Illinois Supreme Court held the employee's due care is to be considered in determining whether the Act was violated, saying: "Thus, if plaintiff were contributorily negligent in failing to apply the brakes in time, that would preclude a finding by circumstantial evidence that the brakes were defective, or that defendant violated the act." (App. I, p. 8a)

Nevertheless, the Supreme Court of Illinois *approved* this instruction (20 Ill. 2d at p. 200, App. I, pp. 7a-8a).

Although the State Courts could not and this court cannot weigh conflicting evidence either as to the extent of unliquidated damages or as to the factor by which contributory negligence, should diminish petitioner's recovery, *if the jury should find contributory negligence and should find respondent guilty only under the Federal Employers' Liability Act and not under the Safety Appliance Act*, those courts should have examined and this court may examine the *uncontradicted* evidence as to petitioner's injuries and monetary losses for the purpose of determining whether the instruction challenged here can reasonably be assumed to have depressed the amount of the plaintiff's earnings.

For that reason, the evidence is summarized in the footnote. (1)

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(1) Suffice it to say that Petitioner was 48 years of age at the time of the injury, employed by Respondent since 1929 (A. 94), was hospitalized from March 29, 1955, to July 23, 1955, confined to crutches for a year thereafter, sustained comminuted fractures of the leg resulting in a shortening thereof, as well as a delayed union, fractures of the ribs and vertebrae, difficulty in walking and in need of a laminectomy for the removal of a vertebral disc. (A. 119-123) He had earned in the year 1954 $3,854 and had an expectation of life of 21.21 years. He was confined to his home, bedridden much of the time, until the trial.

In response to a subpoena concerning earnings of a job to which Petitioner would go, Respondent's claim agent and one of its attorneys of record, appeared on October 30, 1957, at the court and asked additional time to comply. Although a post trial deposition demonstrated that the records and Burge, their custodian, were in Chicago on October 31 and November 1, 1957, and although the claim agent had ascertained from Burge whether Petitioner's seniority was such to give him steady work on the Martinsville Turnaround job, and although the records demonstrated that the men working that job were earning $8,000 annually, Respondent did not produce the records, but sent Burge on his way. (R. 28, 181, 182, 183.)

The Appellate Court (App. II, p. 21a) refused to consider the affidavits filed in support of Petitioner's post trial motion, stating they were not certified by the trial judge as part of the Report of Proceedings, and relied upon three cases, namely: *Dreyer* v. *People*, 188 Ill. 40 (1900); *Mayes* v. *People*, 106 Ill. 306 (1883); *Rock Island & Pacific Ry. Co.* v *Kepple*, 106 Ill. App. 303 (1902), all specifically overruled by statute, Ch. 110, Sec. 74, Ill. Rev. Stats.

STATEMENT AT THE STAGES OF THE CASE IN CIRCUIT COURT OF COOK COUNTY, THE APPELLATE COURT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS IN WHICH THE QUESTION SOUGHT TO BE PRESENTED WAS RAISED.

The instruction challenged here was challenged in accordance with Illinois practice upon plaintiff's post trial motion (R. 25-26), in the Appellate Court, as appears from that court's opinion (App. II, p. 20a, *post*), in the Supreme Court of Illinois, as appears in that court's opinion (App. I, p. 5a, *post*), and on petition for rehearing.

GROUNDS RELIED UPON FOR REVERSAL.

I.

This case should elicit certiorari because in Illinois instructions approved by that State's Supreme Court are officially compiled and published by that court's auspices under the title Illinois Pattern Jury Instructions and are used by all trial judges in cases to which they are applicable. If this instruction is so published, it will become standardized and routine in cases under the Safety Appliance and Employers' Liability Acts in Illinois and in other jurisdictions.

In Illinois, instructions are drafted by counsel and submitted to the trial judges who may refuse or modify the drafts but normally read and deliver them to the jury in the form in which they are tendered, *especially if they have been approved by the Supreme Court of Illinois.*

Beginning with 1961, the Supreme Court of Illinois has caused to be published as an official volume (and therefore without copyright) a manual entitled *Illinois Pattern Jury Instructions* (Burdette Smith Co., Chicago, Publishers)

Petitioner has caused a copy of this volume to be transmitted to the Clerk of this court, with a motion that the same be filed in this case and presented to the court in support of this petition for *certiorari.*

This work contains at page VI a photographic reproduction of a letter from Mr. Justice Clark, Circuit Justice for the Seventh Circuit, to the Hon. Walter V. Shafer, presently the Chief Justice of the Supreme Court of Illinois, felici-

tating the Supreme Court of Illinois upon its "leadership and vision" in "creating and fully shortening its committee," which Mr. Justice Clark rightly said "richly deserves complimentary recognition" and "might well be followed with profit by other states' courts of last resort.

This work bears the imprimatur of eminent trial and appellate lawyers of Illinois and distinguished professors at that State's famous law schools whose names appear at page V of the work.

The manual does not purport to compile all instructions approved by the Supreme Court of Illinois. It makes available only "*pattern*" or, as they are usually called in Illinois, "*standardized*" instructions, that is, instructions adaptable to at least one broad *genus* of cases.

Mindful that this court exercises its discretionary jurisdiction on petitions for *certiorari* principally to fashion the national jurisprudence and not to review every Federal question which, although substantial, is likely to affect only the immediate parties to the case, we say not a word under this Point about the instruction challenged in this case save to note that it is sufficiently general in form to become an archetype of similar instructions in Illinois.

Illinois is the nation's fourth largest State. Chicago is the world's largest railroad center. The dockets of Illinois, not only in Chicago but in East St. Louis and elsewhere throughout that State, are heavily laden with many cases brought under both the Safety Appliance Act and the Employers' Liability Act.

If the instruction here is correct, it should not only become a "pattern instruction" for the trial courts of Illinois but should become standard throughout the nation.

If this instruction is correct, this court should approve it so that injured plaintiffs may bring suits under both Acts or settle them knowing that instructions like this one will be proper and will probably be given.

But if, as we earnestly submit is the case, this instruction is *not* correct but is gravely misleading, this court should grant *certiorari* so that this instruction will not become ritualistic in Illinois and will not infect the jurisprudence of those States and Federal Courts who would normally follow an instruction approved by the highest court of the State that is the most active in railroading in the nation.

II.

The instruction challenged in this case was so gravely misleading that so far as the jury was concerned, it misconstrued the Safety Appliance and Federal Employers' Liability Acts and deprived petitioner of a trial upon the issues defined by those Acts as the governing Federal law of this case.

That the proof of the inefficiency of the appliance was ample, cannot be doubted. (*Spokane & Inland E. R. Co.* v. *Campbell*, 241 U.S. 497, 505; *San Antonio Ry. Co.* v. *Wagner*, 241 U.S. 467, 482; *Myers* v. *Reading Co.*, 331 U.S. 477, 482, 483.)

In the *Campbell* case, (*Spokane & Inland E. R. Co.* v. *Campbell*, 241 U.S. 497, 505) the evidence was when the plaintiff applied the brakes 600 feet from the point of collision. They did not operate in time to avoid the impact, whereas experts stated that the brakes should make a stop within 300 feet.

In the *Wagner* case, (*San Antonio Ry. Co.* v. *Wagner*, 241 U.S. 467, 482) the proof was made by a man who had

worked for eight years as a brakeman and who expressed his opinion as to how the appliance should work.

In the *Myers* case, (*Myers* v. *Reading Co.*, 331 U.S. 477, 482, 483) it discussed the methods of proving the inefficiency of the appliance. An examination of this instruction reveals the defendant stating the plaintiff was not in the exercise of due care and caution for his own safety at and immediately prior to the accident and the defendant further states that the plaintiff was careless and negligent in certain details.

The instruction thus involves a commingling of the Federal Safety Appliance Act with the negligence phase of the Federal Employers' Liability Act. By its terms the jury were told that the defendant could saddle the plaintiff with its own violation of the Appliance Act.

The miscomprehension of the Illinois Supreme Court of this issue is manifest in this statement:

> "Thus if plaintiff were contributorily negligent in failing to apply the brakes in time, that would preclude a finding by circumstantial evidence that the brakes were defective, or that defendant violated the act." (App. I, p. 8a)

Under its interpretation the employee's due care is to be considered in determining whether the Safety Appliance Act was violated. But this Court "swept all issues of negligence out of cases under the Safety Appliance Act." (*O'Donnell* v. *E. J. & E. Ry. Co.*, 338 U.S. 384, 390.) And "Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in or the work which he may be doing at the moment when he is injured.' *Brady* v. *Terminal R. Ass'n.*, 303 U.S. 10,

16; *Louisville & N. R. Co.* v. *Layton*, 243 U.S. 617, 621." (*Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 523.)

If evidence of the employee's negligence is to be admissible on the issue of whether or not the appliance is inefficient then, in each instance, in an action under the Safety Appliance Act, the defendant, under the terms of this opinion, could go into the conduct of the employee on the pretense that it was being done to determine whether the Safety Appliance Act was violated. Such, however, is not the law. When there has been proof of violation, only causal relationship is in issue. "*Once the violation is established, only causal relationship is in issue.*" (*Carter* v. *Atlanta & St. A. RR. Co.*, 338 U.S. 430, 434.)

Thus, we find that notwithstanding adequate and uncontradicted proof of the inefficiency of the operation of the brakes on the particular occasion, this plaintiff was saddled with the interpretation that due care on his part went to the question of whether there was a violation. This, we respectfully submit, is not the law.

We are dealing with the Safety Appliance Act, a creature of Congress. "Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages." (*Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 524.)

A defense of the given instruction would engraft upon the Safety Appliance Act a construction contrary to that given this Federal law by this Court.

Moreover since contributory negligence is not a defense under the Federal Employers' Liability Act but only a factor diminishing damages, it need not be specially presented.

This is true whether the pleading in cases brought in a State court under that Act, are governed by the Federal principles of pleading, *Kansas City Ry. Co.* v. *Jones*, 241 U.S. 118, *Pittsburgh C.C. St. L. R. Co.* v. *Cole*, 260 Fed. 357, or the Illinois Civil Practice Act, *Lee* v. *C. & N. R. Co.*, 349 Ill. App. 276.

It has always been the law that it is improper for a court to single out specific facts and intimate to the jury that such facts are evidence of contributory negligence. This is the Federal rule. *Rio Grande W. Ry. Co.* v. *Leak*, 164 U.S. 280, 288; *Grand Trunk Ry. Co.* v. *Ives*, 144 U.S. 409, 416, 417.

This is also the rule in Illinois. The Supreme Court of Illinois has held in a long line of cases involving common law actions, to which contributory negligence is a complete defense, that "instructions which attempt to specify what conduct on the part of a plaintiff is imprudent or negligent should be refused, those being left for the jury to determine from all the evidence." *P.C.C. & St. L. Ry. Co.* v. *Banfill*, 206 Ill. 553, 556. See also, *C. & N. W. R. Co.* v. *Hansen*, 166 Ill. 623, 628, and *Pennsylvania Co.* v. *McCaffrey*, 173 Ill. 169, 175, 176.

An examination of all the decided cases will disclose that in a negligence action under the Employers' Liability Act, the only instruction to which a defendant is entitled is to the effect that if the jury find that the defendant is guilty of negligence, the employee's contributory negligence is not a bar to his recovery but may be considered in mitigation of damages.

There is no authority approving affirmative allegations by the carrier or of what it contends is negligence on the part of the employee, at least if these allegations are to be read to a jury. More important, an instruction such as was

given, involved certain alleged matters are selected as evidence of negligence by the defendant, has never been approved in any reported case.

In approving an instruction such as the one in question, this opinion stands apart from all authorities deciding the propriety of instructions on the question of contributory negligence.

In considering the propriety of this instruction, it must be remembered that our entire jurisprudence is based upon the assumption that the jury follows the instructions of the court. As was said in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 505, which has become a landmark case in actions under the Federal Employers' Liability Act:

> "We must take it that the verdict was obedient to the trial judge's charge and that the jury found that such was not the case but that petitioner's injury resulted at least in part from the respondent's negligence."

PRAYER FOR CERTIORARI.

For the reasons urged in this petition, this court is respectfully asked to grant certiorari in this important case and to reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX I.

Opinion of the Supreme Court of Illinois

Mr. Justice Hershey delivered the opinion of the court:

This court has granted plaintiff, Kenneth W. Pinkstaff, leave to appeal from a judgment of the Appellate Court, (23 Ill. App. 2d 507) affirming a circuit court judgment entered on a jury verdict awarding plaintiff damages against his employer, the Pennsylvania Railroad Company, in the amount of $50,000 under the Federal Employers' Liability Act and the Federal Safety Appliance Act.

The essential issues involve the propriety of defendant's "theory of the case" instruction referring to plaintiff's alleged negligence in connection with his action under the Federal Employers' Liability Act, and the propriety of the court's post-trial orders authorizing defendant to amend its answer, and dismissing plaintiff's charges of defendant's misconduct at the trial.

We shall summarily review the circumstances and sequence of events insofar as they bear upon these issues. On March 29, 1955, at about 12:30 P.M., defendant's switching crew was bringing some empty hopper cars into Mine 32 of the Maumee Coal Co. at Linton, Indiana. Near the mine there is a thirty-foot-high tipple which conveys coal into the railroad cars. There are three tracks running north and south which converge about five car lengths south of that tipple, so that only one track is used for loading coal at the tipple. As the tracks proceed southward from the tipple they run upgrade to a clay embankment located at the south end of the tracks. The embankment is about four feet high. From this south end of the tracks

the empty cars are allowed to roll downhill one at a time to be loaded at the tipple. The cars are each approximately 45 feet long and about 15 feet high.

At the time of the accident, the empty cars were being backed up southward from the switch onto track I, with the locomotive at the rear. Plaintiff, Kenneth Pinkstaff, the rear brakeman, was riding on top of the leading car—the one most distant from the engine—in order to relay signals to the crew to control the movement of the train. According to plaintiff's testimony, Waggoner, the head brakeman, who was a replacement member of the crew, was not in his proper place, which was some seven or eight cars back from the engine and on top of the cars in position where he could see plaintiff and relay his signals to the engineer. Waggoner apparently left the train when it stopped for the switch to be thrown.

Plaintiff testified that when the lead car on which he was riding was about ten car lengths from the south end of the track, he gave a "steady" signal, and when the car was about eight car lengths from the embankment he gave a "stop" signal. Nevertheless, the train continued to proceed southward at five or six miles per hour. Plaintiff thereupon realized that his signals were not being relayed to the engine crew, and he went down the ladder on the end car to apply the air brakes. While holding onto the ladder at the base with one hand, he "hit the air," or opened the angle cock, causing the air to be released simultaneously on each of the cars, including the engine, in an effort to stop the train. He further stated that when he opened the angle cock the lead car was about three car lengths from the embankment at the end of the track. In his opinion as an experienced railroad man, with 26 hopper

cars in the cut moving about five miles an hour, the train should stop within 50 or 60 feet when the angle cock is opened on the end car, so that there was ample time for the train to stop before reaching the embankment. Nevertheless, the train did not stop, but continued southward to strike and break the embankment, crushing plaintiff between the car and the embankment.

There is some conflict in the record as to how far from the embankment the train was when plaintiff went down to set the angle cock, since the conductor stated that the lead car was then "at least two car lengths from the embankment." Under such circumstances, there would not have been sufficient time for plaintiff to climb down the 15-foot car, set the angle cock, and for the brakes to operate before the train would reach the embankment at the rate of speed it was traveling. There was also a conflict as to whether the customary method of stopping trains in this operation was by hand signals relayed to the engineer, as plaintiff testified, or whether there were several methods, depending upon the conditions of the hill, as defendant's witness testified. The evidence was conflicting also with respect to whether plaintiff was required to use a tail hose to open the angle cock. Pinkstaff's testimony that he had never used an air hose on this job was corroborated by the conductor, Edwards, who also stated that there was no tail hose in the caboose at the time. The road foreman, Wierman, however, testified that shortly after he assumed his duties, he had issued a bulletin on March 16, 1952, which was displayed in the engine house at Bicknell, Indiana, requiring crews setting empty cars at the mines to use a tail hose. There was also a reference to a provision relating to the use of special equipment for opening the angle

cock on moving cars, in the book of safety rules.

On the basis of substantially the foregoing evidence, along with evidence of the nature and extent of plaintiff's injuries and the stipulation of his earnings, the jury awarded plaintiff damages of $50,000. Plaintiff thereupon submitted various post-trial motions. He moved to strike defendant's amended answer, filed over a week after the conclusion of the trial, and also for a new trial. He alleged, among other things, that certain instructions were erroneous; that plaintiff had since learned that defendant's witness Weirman was guilty of perjury in his testimony respecting the issuance of the bulletin in 1952; that defendant failed to comply with a subpoena respecting salaries paid the men on the Martinsville job, even though the records were available, and after agreeing to produce the records, later objected to their introduction in evidence; and also that defendant failed to abide by a compromise offer and accord.

In support thereof, affidavits were submitted by plaintiff and his counsel. Plaintiff attested that Burge, a clerk employed by defendant, informed plaintiff that he had made a search of the records at Bicknell, at the request of defendant's claim against during the pendency of the trial, to find any bulletins issued by Weirman requiring the use of a tail hose, and that he found only a bulletin dated the day of the accident. Burge further told plaintiff that he brought the bulletin to the engine house foreman to take to the trial, and that this information was available to defendant before Weirman testified. These attestations were supported by Burge's post-trial deposition. The trial court denied plaintiff's motion charging defendant and its counsel with misconduct during the trial.

(Appendix)

In connection with plaintiff's post-trial motion to strike defendant's amended answer, our attention is directed to the circumstances surrounding the authorization of the pleading amendments. From the partially recorded colloquy between the court and counsel, it appears that while plaintiff originally predicated his action on the Federal Employers' Liability Act, and went to trial on October 30, 1957, on that count, he was allowed to amend his complaint to add a count alleging defendant's violation of the Federal Safety Appliance Act in furnishing defective air brakes. There was some discussion on November 1, 1957, about allowing defendant's answer to stand as a denial to the additional count, and also of giving it 20 to 30 days to answer. There was also discussion of defendant amending its answer again on November 4, 1957, at the conference in chambers settling the instructions. At that time the trial court rejected plaintiff's original "theory of the case" instruction which set forth at length his own contentions and concluded with a statement that defendant denied such allegations. The court allowed defendant to submit its own "theory of the case" instruction—the controverted No. 17—which recited that defendant filed an answer alleging that plaintiff was contributorily negligent in certain respects in connection with the Federal Employers' Liability Act action, and denying any violation of the Federal Safety Appliance Act.

In reliance on that instruction as a memorandum, and on the fact that the precise answer referred to therein was filed by defendant on November 13, the trial court ruled, some eight months later that, it had granted defendant leave to amend the answer on November 4, otherwise it would never have given the instruction. Consequently, the

court certified the record to recite that leave to amend the answer had been given, and denied plaintiff's motion to strike the amended answer.

The Appellate Court affirmed the trial court's judgment and rulings, and we have granted plaintiff leave to appeal in order to clarify the law respecting such instructions and to scrutinize the grave charges made by plaintiff.

We shall consider first the propriety of the controverted instruction, which provides:

"The defendant in this case filed an answer to both counts of the plaintiff's complaint. The defendant denies that it or any of its agents or employees were guilty of any acts of negligence. In answer to Count I the defendant admits that plaintiff was injured but denies the extent of the injuries claimed.

"Furthermore, the defendant states that the plaintiff was not in the exercise of due care and caution for his own safety at the time of and immediately prior to the occurrence, and the defendant further states that the plaintiff here was careless and negligent in the following respects:

Failed to keep a lookout in the direction in which the train was proceeding;

Failed to use a tail hose as provided and required by the rules in the Bicknell District;

Failed to operate the air brake in time to stop the train before it collided with a dirt embankment;

As to Count II the defendant further denied that it violated the Federal Safety Appliance Act and denies that the air brakes in question failed to operate efficiently."

While the element of contributory negligence referred

to in the controverted instruction is not a bar to recovery under the Federal Employers' Liability Act, that act does provide that contributory negligence may be relied upon to mitigate damages. (45 U.S.C.A., sec. 53). In fact, it has been held prejudicial error, and a denial of a Federal right, to deny defendant an instruction on contributory negligence as mitigating damages under the Federal Employers' Liability Act. *Kansas City Southern Railway Co.* v. *Jones*, 241 U.S. 181, 60 L. ed. 943; *Lee* v. *Louisville and Nashville Railroad Co.*, 349 Ill. App. 276; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Cole*, (6th cir.) 260 Fed. 357.

Although instruction No. 17 does not refer to contributory negligence as mitigating damages, insofar as contributory negligence is an element in defendant's case, it was not error to include this element in its "theory of the case" instruction.

Nor did it become error by virtue of the fact that plaintiff's complaint included, in addition, a count under the Federal Safety Appliance Act. We recognize that the concept of negligence has no application to the Federal Safety Appliance Act (*O'Donnell* v. *Elgin, Joliet and Eastern Railway Co.*, 338 U.S. 384, 94 L. ed. 187), nevertheless, where claims under the Federal Employers' Liability Act and Federal Safety Appliance Act are combined, defendant does not forfeit his right to allege plaintiff's negligence in connection with the Federal Employers' Liability Act claim (*Carter* v. *Atlanta and St. Andrews Bay Railway Co.*, 338 U.S. 430, 94 L. ed. 236). It is necessary only that the instructions observe a clear separation of the two kinds of actions (*O'Donnell* v. *Elgin, Joliet and Eastern Railway Co.*, at p. 393). Inasmuch as it is unmistakably clear from

instruction No. 17 that defendant is alleging plaintiff's contributory negligence only in connection with the Federal Employers' Liability Act claim in count I, and that with respect to the Federal Safety Appliance Act claim in count II defendant is merely denying a violation of that act, the instruction cannot be deemed objectionable for improperly comingling the elements of these claims.

Moreover, in this connection we note that plaintiff's instruction No. 4a specifically informed the jury that any negligence of plaintiff had no application to the Safety Appliance Act, and since instructions must be evaluated as a series, the jury could not have been confused in this respect.

Plaintiff argues, however, that by the controverted instruction No. 17 the jury were told that defendant's violation of the Federal Safety Appliance Act could be relied upon in mitigation of damages. We cannot perceive how any such interpretation could be drawn. Defendant's violation of the Safety Appliance Act would be in furnishing trains with defective brakes. In the absence of any direct evidence of brake failure in this record, the existence of such defective brakes could be established, as plaintiff points out, by circumstantial evidence. Such evidence, however, would have to show not merely that the train failed to stop when the brakes were set, but that the brakes failed to operate when applied in proper time. No inference of brake failure could be drawn from the failure of the train to stop unless the brakes were applied in time for them to operate. Thus, if plaintiff were contributorily negligent in failing to apply the brakes in time, that would preclude a finding by circumstantial evidence that the brakes were defective, or that defendant violated the act. Consequent-

ly, plaintiff's contributory negligence and defendant's violation of the Federal Safety Appliance Act are mutually exclusive; and defendant, in referring to plaintiff's contributory negligence in the instruction, is in no way using its own violation of the act to mitigate damages, as plaintiff contends.

Nor do we find the instruction objectionable for failure to state that plaintiff's contributory negligence caused or contributed to the injury. Since the instruction was not peremptory, it did not need to include all the operative elements of the claim. (*Goldberg v. Capitol Freight Lines, Ltd.*, 382 Ill 283.) Moreover, the jury was specifically informed by instruction No. 11, given at plaintiff's request, that the jury must find that the negligence of plaintiff contributed to his injury in order to lessen damages proportionately.

On the basis of our analysis, therefore, we can find no merit to any of the objections to instruction No. 17 interposed by plaintiff, and its submission to the jury cannot be deemed error.

Plaintiff contends further that the order reciting that defendant had been permitted to amend its answer, entered some eight months after trial, was improper. In support of this alleged error, plaintiff cites *People* v. *Miller*, 365 Ill. 56, 58, where the court reiterated the rule that an amendment of the record cannot be made by oral testimony, or from the recollection of the trial judge himself, but must be proved by the production of some note or memorandum from the record or *quasi* records of the court, or by the judge's minutes, or by the papers on file in the cause. Since the trial judge herein, in ruling that defendant had been granted leave to amend its answer as of No-

vember 4, 1957, specifically stated that he relied upon instruction No. 11 as the written memorial, we find no infringement of the rule. The court noted that the instruction, which was granted on November 4, 1957, at the conference on instructions recited that defendant had filed an answer, and set forth the same allegations as those incorporated in the controverted amended answer. Consequently, the court stated (as appears from the poorly reported record), "I would never have instructed the jury that he filed an answer to both counts if I didn't treat that thought that I had given him permission to treat it as though on that date it was in the file." Thus, the reference in the instruction to the answer as amended, in addition to the fact that the parties themselves treated the amended answer as filed, and the fact that the amended answer was in fact filed on November 13, 1957, a week after leave to amend was supposed to have been given, certainly substantiates the action of the trial court, and precludes a finding of error on this issue.

The action of the trial court is entirely in conformity with the liberal provisions of our Civil Practice Act allowing pleadings to be amended before and after judgment. Ill. Rev. Stat. 1959, chap. 110, par. 46(3).

We consider finally the trial court's dismissal of plaintiff's charges of misconduct by defendant and its counsel in the conduct of the trial, as set forth in the affidavits which plaintiff claims the Appellate Court refused to consider. The fact that the road foreman Weirman may have known before testifying that the only tail hose bulletin found after a search of the records was dated the day of the accident did not convert into perjury his statement that he had issued an earlier bulletin on the subject in 1952.

when he first assumed his duties. In fact, the record shows that similar bulletins were issued in 1949 by the yardmaster, and in 1956 by Weirman's successor. The existence of one bulletin does not preclude the existence of others, or indicate that any such assertion would be a bold lie.

We have given careful scrutiny to the charges of misconduct, and find that the trial court did not err in dismissing them. Nor was any other prejudicial error made in the trial of this cause. Therefore, the judgment of the Appellate Court, affirming the judgment of the trial court, will be affirmed.

Judgment affirmed.

APPENDIX II.

Opinion of the Appellate Court of Illinois.

Mr. Justice Friend Delivered The Opinion Of The Court.

Plaintiff sued under the Federal Employers' Liability Act and the Federal Safety Appliance Act to recover damages for personal injuries sustained by him while employed as brakeman for defendant, the Pennsylvania Railroad Company. Trial by jury resulted in a verdict and judgment in his favor for $50,000.00. His motion for a new trial was denied, and he appeals.

It appears that on March 29, 1955, at about twelve-thirty in the afternoon, defendant's switching crew was bringing into coal mine No. 32 of the Maumee Coal Company at Linton, Indiana, from mine No. 23, a distance of four to five miles, twenty-six empty hopper cars, each approximately froty-five feet long and fifteen feet high. These cars were being shoved with the locomotive and the cab car at the rear. Three tracks, numbered 1, 2, and 3, converged about five car-lengths south of the tipple so that only one track actually was used for loading coal. At the south end of the track is a clay embankment, approximately four feet high. On the day in question, tracks No. 1 and 2 were clear; and there were nine cars at the end of the No. 3 track. The elevation or upgrade of the tracks is south of the tipple; thus the empty cars are allowed to roll, one at a time, downhill (north) to the tipple, to be loaded. Plaintiff was a rear brakeman, working with Engineer Fulk, Fireman Smith, Head Brakeman Waggoner, and Edwards, a conductor. Motions of the locomotive were initiated by hand signals transmitted by members of the crew. Inasmuch as they

were shoving cars with the locomotive at the rear, plaintiff was riding on the top of the end car—the one most distant from the engine—so that he could see and relay the signals controlling the movement of the train. On this particular day, Edwards threw the switch at the north end of the No. 1 track so that the cut of cars could enter. The engineer was then given a "back-up" signal. There is evidence that Waggoner was out of position at the time of this movement. The engineer stated that it was customary for the head brakeman to be stationed on the fireman's side; that Waggoner got off the cut at the tipple and went to the east side of the cut, the same side the engineer was on; and that he received no signals from either the fireman or Waggoner.

When the car on which he was riding was about ten car-lengths from the end of the track, plaintiff gave a "steady" signal which was intended to prepare the engineer to stop. At that time plaintiff's head and shoulders were above the top of the car. There was no response insofar as the forward movement of the car was concerned; it continued to proceed at five or six miles per hour. When his car was about eight car-lengths from the end of the track he gave a stop signal with his hands, but there was no substantial decrease in the forward movement of the train. Plaintiff realized that the other trainmen were not relaying his signals to the engine crew. He then went down the ladder on the end car and, while holding onto it at the base with one hand, "hit the air," i.e., he opened the angle cock. The angle cock is at the end of the car between the drawbar and the front wheels and has a lever about one inch wide and six inches long. Opening the angle cock causes air to be released simultaneously on each of the cars, including

the engine; the operation is designed to slow down or stop the train. When plaintiff opened the angle cock, the last car was about three car-lengths from the embankment at the end of the track. He stated that, in his opinion as an experienced railroad man, with twenty-six hopper cars in the cut moving about five miles per hour, when the angle cock is opened on the end car, the train should stop within fifty to sixty feet. This cut did not stop. Plaintiff attempted to get off after setting the angle cock, but as the train continued on, it struck the embankment, partially breaking through it and crushing him between the car and the embankment. Plaintiff charged in count II of the amended complaint that the air brakes failed to function efficiently, and that such inefficiency constituted a violation of the Federal Safety Appliance Act. Evidence of the gravity of plaintiff's injuries was fully submitted to the jury which, as heretofore stated, awarded him $50,000.00 as damages. He considers the award inadequate, and contends that it was induced by improper instructions, conduct of defendant's counsel, and erroneous rulings on evidence. Aside from charges that he was "overreached" by "misrepresentation, deceit and perjury," that there was subornation of perjury, perpetration of fraud upon the court and counsel, and that defendant's attorney reneged in a pretrial settlement—charges that will be considered later—the principal ground urged for reversal is that the court erred in instructing the jury. Counsel especially stresses what he considers the error of defendant's instruction No. 17, which reads as follows:

> The defendant in this case filed an answer to both counts of the plaintiff's complaint. The defendant denies that it or any of its agents or employees were guilty of any acts of negligence. In answer to Count I

the defendant admits that the plaintiff was injured but denies the extent of the injuries claimed.

Furthermore, the defendant states that the plaintiff was not in the exercise of due care and caution for his own safety at the time of and immediately prior to the occurrence and the defendant further states that the plaintiff was careless and negligent in the following respects:

Failed to keep a lookout in the direction in which the train was proceeding;

Failed to use a tail hose as provided and required by the rules in the Bicknell District.

Failed to operate the air brake in time to stop the train before it collided with a dirt embankment.

As to Count II the defendant further denies that it violated the Federal Safety Appliance Act and denies that the air brake in question failed to operate efficiently.

The trial commenced on October 30, 1957 upon Count I, based on the Federal Employers' Liability Act. On November 1, 1957 plaintiff filed an amendment consisting of an additional count based upon violation of the Federal Safety Appliance Act. When instruction No. 17 was given and the case submitted to the jury, the only answer on file was defendant's general denial, and plaintiff contends it was prejudicial error to give the instruction outlining the issues in the case and stating that defendant had filed an answer to both counts of plaintiff's complaint, notwithstanding the fact that no answer was filed to the amended complaint until November 13, 1957, more than a week after the trial had been concluded. It is urged by plaintiff that since the instruction was not based on any pleading on file during trial, the judgment should be reversed.

(Appendix)

It appears that on November 4, 1957, at the close of all the evidence, a conference was had in chambers, settling the instructions in the case. In the course of that conference, defendant's counsel indicated that he desired to file an amended answer to the amended complaint, as well as an accompanying instruction. The trial judge and the respective counsel apparently desired to bring the case to a close, and in the course of that conference Judge Crowley clearly indicated that defendant would have leave to file an amended answer in conformance with its evidence of contributory negligence adduced upon trial and which was the subject matter of the amended answer to be filed. Defendant's counsel, in the court's presence and that of plaintiff's attorney, dictated the instruction over the telephone to his secretary, and the court later gave it as defendant's instruction No. 17, while also allowing defendant leave to file, within a reasonable time thereafter—twenty or thirty days—its amended answer in conformity therewith. The language of the instruction is substantially identical with the amendment to the answer filed on November 13, 1957. Plaintiff's contention that no order was entered granting leave to amend, was fully argued before the trial judge in connection with his certification of the proceedings. The result of that discussion is reflected in the following certification:

> The Court: Let us have one thing at a time. With respect to that the Court knows that the Court did give them leave to file an amended answer on November 4th, the answer to be filed subsequently thereto, and the Court instructing specifically on the answer being set forth to the jury, the contents of the answer. And the Court will order that the report of proceedings contain a recitation to the effect that the Court granted permission to file an amended answer in ac-

cordance with the instruction that was then given, setting forth the defense as claimed by the defendant.

Predicated on this background, plaintiff's contention is that there was no order of court, that the report of proceedings is contrary to the concept that defendant was given leave at that time to file an amended answer; and plaintiff's counsel argues that obtaining leave to amend a pleading is not equivalent to an amendment, and that until the pleading is amended it remains in the same state as though no leave had ever been given. He cites and primarily relies on *Wisconsin C.R.R.* v. *Wieczorek*, 151 Ill. 579, and *Landt* v. *McCullough*, 206 Ill. 214. However, both these cases were later discussed and distinguished in *Hinchliffe* v. *Wenig Teaming Co.*, 274 Ill. 417, wherein the court stated that the rule adopted in most jurisdictions in this country was to the effect that where a motion to amend has been granted but no amended pleading appears in the judgment roll, it may be treated, on appeal, as if actually made. "Counsel for plaintiff in error," said the court, "relies on the rulings of this court in *Wisconsin Central Railroad Co.* v. *Wieczorek*, 151 Ill. 579, *Landt* v. *McCulloch*, 206 id. 214, and like cases, in which objections were made to the introduction of certain evidence on the ground of variance between the allegations and the proof, leave being given to amend but no amendment being actually made. This court held that there was a variance between the allegations and the proof, and the amendment could not be considered as having been made on the record in those cases. There is nothing to show in those cases that the parties proceeded as if the amendment had been actually made, as they did in this case. We do not think the ruling in that class of cases is controlling here. The amendment here was actually

offered and is in the record. It did not in any way change the character of the proof, either for plaintiff or defendant." In *Howard* v. *Reith*, 243 Ill. App. 450, suit was brought before a justice of the peace in the name of one partner to collect a debt alleged to be due to the firm of which he was a member. On appeal to the Circuit Court, where there was a trial *de novo*, defendant, at the close of plaintiff's evidence, requested a peremptory instruction on the ground that there was a nonjoinder of a necessary party plaintiff. The court granted leave to join the other partner as a co-plaintiff and overruled the motion for a directed verdict. Defendant contended that, even if the court had authority to allow the amendment, it was never actually made, and for that reason the judgment in favor of plaintiffs should be reversed. This contention, however, was rejected, the court saying: "Where there is an order granting leave to amend and the subsequent proceedings in the cause are based upon the assumption that the amendment has been made, the course is to consider the order as standing for the amendment itself. Where a motion to amend has been granted but no amended pleading appears in the judgment roll, it may be treated, on appeal, as if actually made. *Hinchliffe* v. *Wenig Teaming Co.*, 274 Ill. 417-424; *Deutsch-Roemisch Katholischer Central Verein* v. *Lartz*, 192 Ill. 485; *Ohlendorf* v. *Bennett*, 241 Ill. App. 537."

In the recent case of *Pinkerton* v. *Oak Park Nat. Bank*, 16 Ill. App. 2d 91, we had occasion to consider the action of the trial court which gave an instruction pertaining to an act of negligence which did not appear in the complaint. The allegation did not materially change the issues and there could have been no confusion thereby. The amended complaint in that case was never amended on its face, nor

was any formal amendment filed encompassing the words in the court's instructions. In passing on this point, Mr. Justice Bryant, speaking for the court, said: "While it is undoubtedly the general rule that when leave is given to amend a pleading, that does not constitute an amendment [citing the *Wisconsin C.R.R.* v. *Wieczorek* case relied on by plaintiff here], still there are exceptions to that general rule, and it has been generally held that where the parties treat a proposed amendment as having been made, it may be considered by the court as having been made," citing, in support of that conclusion, *Sobieski* v. *City of Chicago*, 241 Ill. App. 180, *Bildhauer* v. *Slovenska Narodna Podporna Jednota*, 234 Ill. App. 350, and *Howard* v. *Reith*, discussed above. We pointed out that defendants in the trial court accepted the amendment and proceeded as if it had been made. Under such circumstances it was logical to hold that the statutory requirements had been met; a pleading may be amended at any time, before or after judgment, to conform it to the proofs, upon terms as to costs and continuance that may be just (Ill. Rev. Stat. 1959, ch. 110, §46, subpar. 3).

In the case at bar it is clear that the parties and the court treated the amendment as if it had actually been filed, and Judge Crowley, in his post-trial hearing on July 2, 1958, specifically so held. He pointed out that plaintiff himself submitted two instructions (plaintiff's instructions Nos. 11 and 12) on the issue of contributory negligence, saying:

> As to your [plaintiff's] instruction number 12, you not only clearly indicated that you knew and you understood that the issue with reference to contributory negligence as set forth in the contemplated amended answer, because in instruction number 12, it is at your

request I instructed the jury with respect to count one. "You are instructed that the burden of proof—"

The court continued:

> Mr. Dooley, you knew that there was an instruction setting forth their issue of their answer. You knew that and I will tell you why you knew it, and you knew it because when you amended your instruction you withdrew from your one instruction the question with regard to what was contained in their answer. And you submitted a corrected instruction leaving it to them to set forth what they would claim and set forth in their answer.
>
> There was no doubt about our contemplation at that particular time. I am satisfied and I am satisfied likewise that you knew what was to be contained therein without any question, because it is clear to me that we all knew that we were going to let the defendant set up his defense and his instruction to make his new issue. It is set forth merely in his allegation.
>
> That is why there was a correction of the instruction number one, which you supplied by supplying a 1A instruction.
>
> * * * I would never have instructed the jury that he filed an answer to both counts if I didn't treat that thought that I had given him permission to treat it as though on that date it was in the file.

Moreover, it appears to be the rule in this State that the report of proceedings, once certified by the trial judge, as to any ruling made by him or proceeding had in his presence may not be contradicted by affidavits of counsel. *Mayes* v. *People*, 106 Ill. 306; *Rock I. & P. Ry.* v. *Kepple*, 106 Ill. App. 303; *Dreyer* v. *People*, 188 Ill. 40. Upon the foregong record, we hold that the court clearly indicated, in the course of the conference on settling the instructions, that defendant should have leave to file an amended an-

swer, that plaintiff must have been fully aware of this circumstance, and that both parties, as well as the court, treated the amendment as if it had actually been filed.

It is urged, however, aside from the foregoing considerations, that the amendment to defendant's answer did not correctly state or explain the doctrine of contributory negligence which mitigates damages in FELA cases and "was in fact not only meaningless but misleading"; and that defendant's instruction No. 17, based on the amended answer, usurped the province of the jury in that it told them that certain facts constituted negligence. The amended answer set forth "that plaintiff was not in the exercise of due care and caution for his own safety * * * and that the plaintiff was careless and negligent" in certain respects, specifying three particular instances in which he is alleged to have failed in exercising reasonable care and caution. The criticism of the amended answer and instruction No. 17 is that nowhere does it aver that the negligence of plaintiff caused the injury, and counsel argues that unless plaintiff is guilty of negligence which caused the injury it is not to be considered in mitigation of damages, citing several Federal and Illinois cases. It appears that plaintiff had tendered his instruction No. 1 in which the original complaint and answer were summarized. Since the issue of contributory negligence had arisen during the trial and was not covered in the original answer, defendant desired to file its own instruction setting forth its own theory of the case. Plaintiff thereupon witdrew his original instruction No. 1 and substituted his instruction No. 1(a) which deleted several sentences stating defendant's theory of the case; defendant thereupon prepared its instruction No. 17 setting forth its theory of the case. Defendant had the right

to such an instruction. It was so held in *Sims* v. *Chicago Transit Authority*, 7 Ill. App. 2d 21, wherein the court said that "it is elementary that every party has the right to have the law applicable to his case stated fairly, clearly, distinctly and conveyed to the jury with substantial accuracy so that it may not be misled to the prejudice of the party." It has also been held that every party has the right to an instruction setting forth its contentions of contributory negligence, and where an instruction is not peremptory it need not state the entire doctrine of contributory negligence. Instruction No. 17 merely states certain contentions of defendant. It does not purport to direct a verdict for either party and therefore need not be complete in itself. *Goldberg* v. *Capitol Freight Lines*, 382 Ill. 283; *Donnelley* v. *Penn. R.R.*, 342 Ill. App. 556. In the *Goldberg* case an instruction was criticized because it was said to be peremptory and yet did not require the jury to find that the negligence charged was the proximate cause of the injury; the court held that the instruction was not peremptory but was directed solely to the apportionment of damages between the various defendants and was limited to the elements of negligence and damages as defined in the instruction. "In other instructions," said the court, "the jury was told damages could not be awarded unless the negligence charged was the proximate cause of the injury and that actionable negligence must bear a causal relationship to the resulting damages. When taken together with other instructions and read as one connected series, the instruction was not improper. *Chicago City Railway Co.* v. *Bundy*, 210 Ill. 39; *Central Railway Co.* v. *Bannister*, 195 id. 48." In the instant case, it was not necessary for the court in defendant's instruction No. 17 to charge the jury that the acts complained of caused or contributed to the injury

since such matters were fully covered by plaintiff's given instruction No. 11 which reads as follows:

> With reference to Count I, the Act of Congress further provides that the fact that the injured employee may have been guilty of contributory negligence, if any, does not bar a recovery, but under such circumstances the damages shall be diminished in proportion to the negligence attributable to such employee. You are therefore instructed that if, from the preponderance or greater weight of the evidence in this case, you find that defendant was guilty of one or more of the charges of negligence alleged in plaintiff's complaint, and further find from the preponderance or greater weight of the evidence in this case that plaintiff was guilty of negligently contributing to his injury, then plaintiff's contributory negligence, if any, does not bar him from recovering in this action, but will affect any damages he is entitled to recover, lessening such damages, if any, to the extent that his negligence, if any, contributed to this accident.

It is further urged that instruction No. 17, based on the amended answer, usurped the province of the jury in that it told them that certain facts constituted negligence. There is no merit to this contention. The instruction is merely defendant's theory of the case and as such embodies the allegations of its answer and not the court's directions. This appears from plaintiff's instruction No. 2 wherein the court explicitly told the jury that "the complaint filed by the plaintiff in this case and the answer filed by the defendant are the unsworn statements of what the plaintiff and defendant allege, and they neither prove nor tend to prove any allegation contained therein, with relation to this case." There is evidence in the record from which the jury could have found that the accident resulted from:

1) failure to use a tail hose as required by the [illegible] Pennsylvania Railroad;

2) failure to keep a proper lookout; and
3) resultant failure to operate the air brake in time to avoid hitting the embankment.

Plaintiff criticizes three other instructions. It is urged that defendant's instruction No. 18, which reads:

> With reference to Count I you are instructed that the defendant is not an insurer of the safety of its employees and the defendant railroad is not liable for injuries, if any, received by the plaintiff unless such injuries, if any, are proved by a preponderance of the evidence to have been proximately caused in whole or in part by the negligence of the defendant,

is misleading in that the introductory phrase, "with reference to Count I," applies only to the clause, "the defendant is not an insurer," and not to the entire sentence. Yet plaintiff himself tendered two instructions, Nos. 11 and 12, which open with the same phrase, and his instruction No. 11 is twice as long as defendant's instruction No. 18. Plaintiff's practice would seem to negative his criticism. It is conceded that the defense of proximate cause has been abolished in FELA actions; however, it does not follow that the instruction is improper, since the terminology adopted is not "proximate cause" but, rather, "proximate cause in whole or in part." Since the instruction contains the statutory language "in whole or in part," the only question is whether the instruction is rendered improper by the additional inclusion of the word "proximate." Both Federal and Illinois authorities, in interpreting the statutory language, have stated that it is enough for liability if the defendant's negligence "contributed in whole or in part" to plaintiff's injuries, or was "in whole or in part" the "proximate cause" of plaintiff's injuries; see *Carter v. Atlanta & St. A.B. Ry.*, 338 U.S. 430; *Wantland v. Illinois*

Cent. R.R., 237 F. 2d 921 (7th Cir.); *Dowler* v. *N.Y., C. & St. L. R.R.*, 5 Ill. 2d 125.

Defendant's instruction No. 11(a) reads:

> The plaintiff is required to prove his case by the greater weight of the evidence, and if he has not so proved his case, or if the evidence is evenly balanced so that you are unable to say on which side is the greater weight of the evidence, or if the greater weight of the evidence is in favor of the defendant, then in any such event, the plaintiff cannot recover from the defendant.

In support of plaintiff's criticism of this instruction, he cites and relies on three cases from the second and third Appellate Court districts (*Hughes* v. *Medendorp*, 294 Ill. App. 424 (3rd Dist. 1938), *Healy* v. *N.Y. Cent. R.R.*, 326 Ill. App. 556 (2nd Dist. 1945), and *Denny* v. *Dorr*, 333 Ill. App. 581 (2nd Dist. 1948), but does not advise the court that they were later overruled in the districts in which they had been decided; see *Alexander* v. *Sullivan*, 334 Ill. App. 42 (3rd Dist. 1948), specifically disavowing the *Hughes* and *Healy* cases cited by plaintiff; *Ashton* v. *Sweeney*, 350 Ill. App. 135 (2nd Dist. 1953), specifically disavowing the *Healy* ruling; and *Laurent* v. *Rinehart*, 2 Ill. App. 2d 410 (2nd Dist. 1954). The Supreme Court of Illinois, in *Koshinski* v. *Illinois Steel Co.*, 231 Ill. 198, and in *North Chic. St. R.R.* v. *Fitzgibbons*, 180 Ill. 466, approved the law as given in this instruction, and, relying on the *Koshinski* case and other authorities, we recently approved a similar instruction in *Sankey* v. *Interstate Dispatch, Inc.*, 339 Ill. App. 429.

The last of the instructions criticized is defendant's No. 19 dealing with the credibility of witnesses, in which the jury were told that they have no right to disregard the tes-

timony of an unimpeached witness on the sole ground that such witness is an employee of defendant. Plaintiff argues that by giving this instruction the court deprived the plaintiff of the right to have the jury take into consideration the interest of the defendant's employee witnesses. The law as stated in this instruction has been expressly approved, both as to substance and language, in Federal and Illinois cases; see *Chesapeake & O. Ry.* v. *Martin*, 283 U.S. 209; *Roberts* v. *Chicago City Ry.*, 262 Ill. 228; *Chicago Union Traction Co.* v. *Mompsen*, 107 Ill. App. 353.

Considerabe space is devoted in the brief to a discussion of a device called a tail hose, and rules requiring its use by brakemen. It is a length of hose attached to the angle cock, with a valve at the end, which permits a member of the crew to set the brakes on a train from the side ladder of the car on which he is standing, one or two rungs from the top of the car, without having to climb down the rear ladder to the angle cock, as plaintiff did in this switching operation. Plaintiff argues that the tail hose should not have been received in evidence, and that it was error to permit a demonstration of its use by Weirman, assistant trainmaster for defendant. Plaintiff asserts that evidence of a violation of the Federal Safety Appliance Act was uncontradicted; that the angle cock did not operate efficiently; and that as a consequence the train hit the embankment. But there is no actual evidence of any defect; on the contrary, such evidence was entirely circumstantial, and rested entirely on the assumption that plaintiff could descend the back ladder of the hopper car, grasp the ladder with one arm, and bend over and open the angle cock, all within a very short space of time—four seconds, as defendant computes it from plaintiff's own testimony as to

the speed of the train and the distance to the embankment. This presented a question of fact for the jury as to whether the use of a tail hose, rather than the method employed by plaintiff, could have stopped the train in time to avert the accident. It should be noted that plaintiff filed his case and tried it on the FELA charges of negligence, much broader in scope than the charge of brake failure predicated on the Federal Safety Appliance Act, set forth in Count II. It was only after the presentation of his case in chief, after two and one-half days of trial, that plaintiff presented the amendment to the complaint, adding the Safety Appliance Act count. By that time the tail hose was already in issue in the case. Plaintiff's witness Edwards had already testified that employees were required to use tail hoses in stopping the trains, but added that plaintiff never did; and indeed plaintiff admitted he would have been in a much safer position had he used a tail hose, but denied the existence of an order requiring its use by employees.

Another phase of the tail-hose controversy embraces plaintiff's charge of perjury on the part of one of defendant's witnesses. On trial, defendant called Charles Weirman, who was assistant trainmaster on March 29, 1955, the date of this accident. Weirman had held this position from March 16, 1952 until some time in 1956. He testified that about two weeks after assuming this position he had "issued instructions over [his] signature that crews setting empty cars on a hill at the mines in the vicinity would use the tail hose in this operation." This is the testimony plaintiff claims constitutes perjury. On cross-examination Weirman was asked where these instructions were, to which he answered, "I don't really know * * *," but added that but

letins of this type were ordinarily kept as part of the permanent records of the company. Plaintiff's post trial affidavit and the deposition of Jack Bufge, who was employed as a clerk-crew dispatcher in the Bicknell office of defendant, state that the search for the notice had been conducted by Burge, and that Weirman's notice had not been located; that following the trial, Burge informed plaintiff that he had been present in Chicago on October 31 and November 1, 1957, that upon his return to Bicknell he was requested by a claim agent to search for the bulletin or order issued by Weirman, that on Saturday, November 2, 1957, he found one issued by Weirman on the date of plaintiff's accident, and that he immediately notified defendant to that effect. Burge's deposition was taken subsequent to the trial, and these facts were confirmed. In that deposition Burge stated that when he returned to Bicknell on Saturday, November 2, 1957, he found the bulletin issued by Weirman on the date of the accident and left it at the home of Frank Wright, defendant's engine house foreman, according to the instruction given by the claim agent; and he added that this was the only bulletin issued by Weirman that he could find. Commenting on this phase of the evidence, plaintiff's counsel says:

> It is interesting to note that the only instruction or bulletin Weirman ever testified to was one purportedly issued in 1956 (A. 167), but it was conclusively shown that (1) such was not the fact, and (2) that defendant knew that it was not the fact on Saturday, November 2, 1957, and nevertheless had the witness testify on Monday, November 4, 1957, that the date of issuance of the said bulletin was in 1952.

It appears, however, that there was more than one "tail hose" bulletin—defendant makes reference to four. Weir-

man issued two such orders, the first in 1952, shortly after he assumed the position of assistant trainmaster, the second, the day of plaintiff's accident; Lloyd Jones, the yardmaster, had posted one in 1949, as did Weirman's successor, Eannace, in 1956. The evidence discloses that some of the men found the tail hose cumbersome and failed to use it unless they were, from time to time, ordered to do so. Shortly after Weirman assumed his position as assistant trainmaster and assistant road foreman and saw that the tail hose was not being used, he issued a bulletin ordering its use. On the day of the accident, when he saw that the tail hose had not been used, he re-issued the order and threatened that the job would be policed and offending crews held responsible. Moreover, there was a general order contained in the book of safety rules issued to plaintiff, with which he admitted familiarity. Rule No. 1017 of the Safety Manual reads: "Manipulating Angle Cock on Moving Engine, Train, or Cabin Car without the Use of Special Equipment for the Purpose, except in emergency, is Prohibited." Despite the evidence of the rule prior to the date of the accident, plaintiff contends that defendant's counsel suborned perjury on November 4, 1957, when he permitted Weirman to testify as to the prior existence of the rule. It is charged that perjury took place because defense counsel knew, or must have known, that on Saturday morning, November 2, 1957, Burge had tried unsuccessfully to find Weirman's 1952 bulletin board notice in the freight house at Bicknell. Judge Crowley fully heard the substance of this charge, and we think he properly dismissed it.

Another charge of misconduct on the part of defense counsel arises from the service of a subpoena duces tecum

directing that defendant produce on October 30, 1957, at 2:00 p.m., certain records showing the gross earnings of plaintiff during various years of his employment by defendant, and especially the gross earnings of brakemen on what is known as the turn-around job at Martinsville, Indiana, during the years 1955, 1956, and 1957. It appears that on the date in question A. L. Foster, defendant's claim agent, together with defendant's counsel, appeared before the trial judge and represented that some of the records sought by the subpoena were in Indianapolis; that it would take some time to obtain the information, but that they would produce it. When it came time to rest plaintiff's case on Friday, November 1, 1957, it was done with the understanding that plaintiff would be allowed to reopen his case when the information sought by the subpoena was furnished, and in his post-trial affidavit plaintiff's counsel alleged that defendant represented that this would be done on the following Monday, November 4. On Monday morning defense counsel stated that he did not yet have that information, but would have it in the afternoon. Plaintiff's counsel further alleged that on that afternoon defendant for the first time "complained of the matters sought by the subpoena duces tecum and requested of the Court that it be not required to produce" the gross earnings of the brakeman at the turn-around job at Martinsville during 1955, 1956, and 1957. Although the record shows the issuance of the subpoena directing the production of certain records, there is nothing to suggest that any of the information sought therein was ever turned over to plaintiff. Defendant's counsel, in their brief, say that in conference in Judge Crowley's chambers on November 2, 1957 a discussion was had which included (1) the propriety of allowing plaintiff to amend his complaint, and (2) evidence concern-

ing plaintiff's earnings; and defense counsel comment that plaintiff has preserved only that portion of the conference relating to the first question, namely, the propriety of allowing plaintiff to amend his complaint by adding Count II. The reference to the subpoena seeking pay records is found only in post-trial affidavits made on behalf of plaintiff. Defense counsel assert that in the discussion in chambers it was agreed that the substance of the information sought by the subpoena duces tecum would be read into the record by stipulation; that they then returned to the courtroom, where plaintiff read into evidence the stipulated evidence regarding earnings; and that immediately thereafter plaintiff closed his case. There is the further statement of defense counsel that there was a short informal discussion on the subject of plaintiff's earnings, at the conclusion of which the judge indicated that in his opinion a report of the Martinsville turn-around earnings would not be admissible in evidence, and that plaintiff's counsel did not press the point further. This version of defense counsel is contradicted in the ex parte affidavits filed subsequent to the trial; they deal largely with matters that are alleged to have occurred outside the presence of the court. It must be presumed, however, that the trial judge knew what statements were made in his presence, and while affidavits may be used to refresh his recollection, such affidavits may not be considered on appeal unless the facts and matters contained therein are certified as correct by the trial judge as part of the report of proceedings. *Dreyer* v. *People*, 198 Ill. 40; *Mayes* v. *People*, 106 Ill. 306; *Rock Island & P. R.* v. *Kepple*, 106 Ill. App. 303.

The significance of the Martinsville turn-around wage scale is its relation to the measure of damages. That job

which had a higher wage scale than the job plaintiff held at the time of the accident; had been open to him for more than a year prior to the accident, but he had never taken the Martinsville job. It has been held that damages which are merely possible are speculative (*Salaban* v. *East St. L. & I. Water Co.*, 284 Ill. App. 358), and that recovery for the future loss of earning capacity must be limited to such loss as is reasonably certain to occur (*Isbitz* v. *Chicago City Ry.*, 192 Ill. App. 487). We think that Judge Crowley was correct in concluding that the Martinsville turn-around earnings record would not have been admissible in evidence, even if it had been properly offered.

Finally, it is urged in post-trial affidavits that defense counsel "reneged" on a settlement of the case. The Chicago Milwaukee, St. Paul and Pacific Railroad had an agreement with the Pennsylvania for sharing losses, under which the Chicago Milwaukee would be obliged to pay sixty-five per cent on any loss or settlement. Plaintiff's counsel says that Edwin Schiewe, general solicitor of the Milwaukee, was willing to settle at $100,000.00, but would so do only with the consent of the Pennsylvania's attorney, and that he informed plaintiff's counsel that it "was entirely up to the Pennsylvania." Defendant's counsel refused to recommend a settlement in that amount. Plaintiff's attorney claims that he considered the matter as having been settled and therefor dismissed Durkin, an expert witness, who had been waiting to testify, and that when counsel learned on November 4, 1957 that the case could not be settled, Durkin was no longer available. It appears from a post-trial affidavit of plaintiff's counsel that Durkin was visiting his married daughter in Park Forest, Illinois. The affidavit does not disclose how long Durkin visited his daughter

and whether any efforts were made to locate him after the settlement had failed and during the pendency of the trial: but since Park Forest is within commuting distance of Chicago it would have been possible to put Durkin on the stand on November fourth or to continue the matter another day, until November fifth, without disbanding the jury. The fact remains, however, that no motion was made for a continuance pending a search for the witness. The law is well settled in Illinois that an absolute prerequisite to a motion for a new trial as a result of the absence of a material witness is a motion presented by the interested party asking the court to continue the cause pending search for the witness. *Kendall* v. *Limberg*, 69 Ill. 355; *Mastin* v. *National Tea Co.*, 278 Ill. App. 60; *Casey* v. *Sawyer Biscuit Co.*, 163 Ill. App. 145. In fact, the granting of a motion for a new trial, in the absence of a prior motion for continuance, has been held, in the *Maston* case cited above, to be reversible error. We find nothing of record to indicate that any complaint was made to Judge Crowley regarding a missing witness. The sole point with respect to Durkin's testimony is that plaintiff was denied the opportunity of corroborative testimony; as an experienced railroad man Durkin was prepared to testify that, in the words of plaintiff's chief counsel, "the airbrakes were not operating efficiently." On the authority of *Nehring* v. *Ricker*, 126 Ill. App. 262, a party cannot proceed without asking a continuance, knowing of a witness whose testimony will tend to corroborate him, and then have a new trial in order to produce such witness.

The foregoing charges, which are discussed at length in the respective briefs of counsel, were rejected in their entirety by Judge Crowley after a full hearing. Plaintiff has not seen fit to preserve the record of proceedings be-

fore the trial judge, nor of his rulings thereon. On the basis of what is before us, we think these charges were properly rejected.

From an exhaustive examination of the record, we are convinced that the case was carefully and impartially tried by the court, and, finding no convincing reason for reversal, we affirm the judgment of the Circuit Court.

Judgment Affirmed.

Bryant, P. J., and Burke, J., Concur.

APPENDIX III.

The Judgment Appealed From, Entered September 29, 1960

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Appellate Court for the First District aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant costs by it in this behalf expended, to be taxed, and that it have execution therefor.

APPENDIX IV.

Order of the Supreme Court of Illinois. Entered November 30, 1960

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.